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Dato' Seri Anwar bin Ibrahim v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–144 OF 2009 (W), 05–145 OF 2009 (W) AND 05–146 OF 2009 (W)

ZULKEFLI, MOHD GHAZALI AND HELILIAH FCJJ
22 JUNE 2010

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Civil Procedure — Appeal — Jurisdiction — Application to review court's earlier decision — Grounds for — Whether warranted court to invoke r 137 of the Rules of the Federal Court 1995 — Whether occasioned injustice or abuse of process of the court

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Civil Procedure — Jurisdiction — Federal Court — Inherent powers under r 137 of the Rules of the Federal Court 1995 — Whether power to review not supplemental to appellate jurisdiction of Federal Court — Whether r 137 could be used for determining appeals — Whether power to review limited to issues of injustice or abuse of processes — Whether relitigation of appeal on merits permitted

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Constitutional Law — Courts — Federal Court — Inherent powers under r 137 of the Rules of the Federal Court 1995 — Whether power to review not supplemental to appellate jurisdiction of Federal Court — Whether r 137 could be used for determining appeals — Whether power to review limited to issues of injustice or abuse of processes — Whether relitigation of appeal on merits permitted

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The applicant was charged with an offence under s 377B of the Penal Code. The applicant filed a notice of motion for an order to compel the respondent and/or other persons having care, custody and control to produce to the applicant documents, certain materials and items. The learned High Court judge ordered the respondent to comply with almost all of the prayers in the application. The respondent appealed against this decision and the applicant cross appealed against the decision not allowing certain parts of the applicant's application. The Court of Appeal dismissed the cross appeal and allowed the respondent's appeal in parts. The applicant appealed to the Federal Court by way of three appeals against the decisions of the Court of Appeal. The Federal Court dismissed all the appeals and affirmed the findings of the Court of Appeal. The appeals were decided on merits. The applicant then filed the present application pursuant to r 137 of the Rules of the

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Federal Court 1995 ('the Rules') for an order for the Federal Court to review its judgment. A

Held, dismissing the application:

(1) (per **Zulkefli FCJ**) Rule 137 cannot be construed as conferring upon the Federal Court the statutory jurisdiction or the new jurisdiction to hear any application to review its own decision. However, under r 137 the Federal Court still has the limited 'inherent power' or 'inherent jurisdiction' in order to maintain its character as a court of justice to hear any application or to make any order to prevent injustice or to prevent an abuse of the process of the court. Further, the inherent powers of the Federal Court under r 137 cannot be invoked to review its own decision on its merits. Such inherent power is strictly confined to procedural matters only (see paras 2 & 6). B C

(2) (per **Zulkefli FCJ**) The applicant had intended to move the court to review the issues on their merits. This was clearly outside the purview of r 137. The earlier panel of the Federal Court had already delivered a judgment and had addressed all issues canvassed in the appeal before them. The due process of the law had taken its course. The applicant had exhausted his legal remedies. There must be finality to deciding any dispute and it could not be reviewed ad infinitum (see para 11). D E

(3) (per **Heliliah FCJ**) This application arose out of the disposal of an appeal by the Federal Court in the exercise of its appellate jurisdiction and that jurisdiction is in accordance with the provisions of art 121(2)(a) read with art 128(3) of the Federal Constitution. In this context it cannot therefore be the position that there is supplemented to the appellate jurisdiction of the Federal Court, a new jurisdiction that is additionally a 'review' jurisdiction conferred by the rules committee of the court where the status of the Rules remains a subsidiary legislation (see paras 28–29). F G

(4) (per **Heliliah FCJ**) Rule 137 is part of the Rules made in the exercise of powers conferred by s 17 of the Courts of Judicature Act 1964. The rules promulgated pursuant to s 17 are subsidiary legislation regulating practice and procedure. Rule 137 was incorporated to regulate practice and procedure. It cannot be said to be a rule for purposes of 'determining' appeals (see paras 53 & 55). H

(5) (per **Heliliah FCJ**) The integrity of a final judgment, when the appellate processes have been completed, have to be protected for its finality or conclusiveness for that is fundamental to the facet of appellate jurisdiction vested in the Federal Court (see para 70). I

(6) (per **Heliliah FCJ**) By virtue of being at the apex it is only the Federal Court (and no other non judicial branch) that has to be the organ to

deal with 'injustice' or 'abuse of processes'. It is in that limited sense that the jurisdiction itself stems from the inherent powers, for the powers being intrinsic and organic to the judicial powers of the Federal Court, those powers may therefore be drawn upon as and when circumstances require. It therefore constitutes a separate exercise and more of a rectifying process (see para 72).

(7) (per **Heliliah FCJ**) The applicant's complaint did not fall within the scope of r 137. The Federal Court had already evaluated issues of facts and law and arrived at an interpretation. To accede to the issues raised by the applicant was tantamount to permitting a case to be relitigated on account of the applicant disagreeing with certain interpretation of law. The object of r 137 is not to defeat finality (see para 75).

[Bahasa Malaysia summary

Pemohon telah dituduh kerana kesalahan di bawah s 377B Kanun Keseksaan. Pemohon telah memfailkan notis usul untuk perintah memaksa responden dan/atau mereka yang mempunyai milikan, pemeliharaan dan kawalan untuk mengemukakan kepada pemohon dokumen-dokumen, bahan-bahan dan item-item tertentu. Hakim Mahkamah Tinggi yang bijaksana telah memerintahkan responden mematuhi hampir semua permohonan dalam permohonan itu. Responden telah merayu terhadap keputusan ini dan pemohon telah membuat rayuan balas terhadap keputusan itu yang tidak membenarkan bahagian tertentu permohonan pemohon. Mahkamah Rayuan telah menolak rayuan balas itu dan membenarkan sebahagian daripada rayuan responden. Pemohon telah merayu ke Mahkamah Persekutuan melalui tiga rayuan terhadap keputusan-keputusan Mahkamah Rayuan. Mahkamah Persekutuan telah menolak kesemua rayuan itu dan mengekalkan penemuan-penemuan Mahkamah Rayuan. Rayuan-rayuan tersebut telah diputuskan atas merit. Pemohon kemudian telah memfailkan permohonan ini menurut k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('Kaedah tersebut') untuk perintah Mahkamah Persekutuan mengkaji semula penghakimannya.

Diputuskan, menolak permohonan:

(1) (oleh **Zulkefli HMP**) Kaedah 137 tidak boleh ditafsirkan sebagai memberi Mahkamah Persekutuan bidang kuasa statutori atau bidang kuasa baru untuk mendengar apa-apa permohonan untuk mengkaji semula keputusannya sendiri. Walau bagaimanapun, di bawah k 137 Mahkamah Persekutuan masih mempunyai 'inherent power' atau 'inherent jurisdiction' yang terhad bagi tujuan mengekalkan sifatnya sebagai mahkamah keadilan untuk mendengar apa-apa permohonan atau membuat apa-apa perintah untuk mengelak ketidakadilan atau mengelak penggunaan salah proses mahkamah. Bahkan, kuasa-kuasa sedia ada Mahkamah Persekutuan di bawah k 137 tidak boleh

digunakan untuk mengkaji semula keputusannya sendiri atas meritnya. Kuasa sedia ada tersebut hanya terhad kepada perkara-perkara prosedur sahaja (lihat perenggan 2 & 6).

(2) (oleh **Zulkefli HMP**) Pemohon telah berhasrat untuk memohon mahkamah mengkaji semula isu-isu atas meritnya. Ini jelas di luar skop k 137. Panel terdahulu Mahkamah Persekutuan telahpun menyampaikan penghakiman dan telah mengemukakan semua isu-isu yang dibentangkan dalam rayuan di hadapan mereka. Proses undang-undang sewajarnya telah dilaksanakan. Pemohon telah menggunakan remedinya di sisi undang-undang. Perlu ada kemuktamadan dalam memutuskan apa-apa pertikaian dan ia tidak boleh dikaji semula ad infinitum (lihat perenggan 11).

(3) (oleh **Heliliah HMP**) Permohonan ini timbul daripada pelupusan rayuan oleh Mahkamah Persekutuan dalam menggunakan bidang kuasa rayuannya dan bidang kuasa tersebut adalah menurut peruntukan perkara 121(2)(a) dibaca bersama perkara 128(3) Perlembagaan Persekutuan. Dalam konteks ini ia tidak boleh dengan itu berada dalam kedudukan bahawa terdapat tambahan kepada bidang kuasa rayuan Mahkamah Persekutuan, bidang kuasa baru yang merupakan tambahan bidang kuasa 'review' yang telah diberikan oleh Jawatankuasa Kaedah mahkamah di mana status Kaedah tersebut masih merupakan perundangan subsidiari (lihat perenggan 28–29).

(4) (oleh **Heliliah HMP**) Kaedah 137 adalah sebahagian daripada Kaedah tersebut yang digubal dalam penggunaan kuasa-kuasa yang diberikan oleh s 17 Akta Kehakiman Mahkamah 1964. Kaedah tersebut diisytiharkan menurut s 17 perundangan subsidiari yang mengawal amalan dan prosedur. Kaedah 137 telah digubal untuk mengawal amalan dan prosedur. Ia tidak boleh dikatakan sebagai kaedah bagi tujuan rayuan-rayuan 'determining' (lihat perenggan 53 & 55).

(5) (oleh **Heliliah HMP**) Integriti penghakiman muktamad, apabila proses-proses rayuan selesai, perlu dilindungi kemuktamadan atau kepastiannya kerana ia penting dari aspek bidang kuasa rayuan yang telah diberikan kepada Mahkamah Persekutuan (lihat perenggan 70).

(6) (oleh **Heliliah HMP**) Sebagai mahkamah tertinggi hanya Mahkamah Persekutuan (dan bukan cawangan yang bukan kehakiman) yang perlu menjadi badan untuk menguruskan 'injustices' atau 'abuse of processes'. Dalam sifat terbatas ini bidang kuasa tersebut berpunca daripada kuasa-kuasa sedia ada, kerana kuasa-kuasa tersebut yang intrinsik dan organik kepada kuasa-kuasa kehakiman Mahkamah Persekutuan, kuasa-kuasa tersebut boleh diperoleh bila dan apabila keadaan memerlukan. Oleh demikian ia membentuk pelaksanaan berasingan dan lebih merupakan proses membetulkan (lihat perenggan 72).

(7) (oleh **Heliliah HMP**) Aduan pemohon tidak terangkum dalam skop k 137. Mahkamah Persekutuan telahpun menilai isu-isu fakta dan undang-undang dan telah tiba kepada satu pentafsiran. Untuk bersetuju dengan isu-isu yang ditimbulkan oleh pemohon sama seperti membenarkan satu kes itu dibuat litigasi semula berdasarkan pemohon tidak bersetuju dengan pentafsiran undang-undang tertentu. Tujuan k 137 bukan untuk menggagalkan kemuktamadan (lihat perenggan 75).]

Notes

For cases on Federal Court, see 3 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1958–1961.

For cases on jurisdiction, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1083–1085.

For cases on jurisdiction of the Federal Court, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4411–4415.

Cases referred to

Adorna Properties Sdn Bhd v Kobchai Sosothikul [2006] 1 MLJ 417; [2005] 1 AMR 501; [2005] 1 CLJ 565, FC (folld)

Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, & another application [2005] 3 MLJ 1; [2004] 5 AMR 709; [2004] 4 CLJ 350, FC (folld)

Ampthill Peerage, The [1977] AC 547, HL (refd)

Anisminic Ltd v Foreign Compensation Commission and another [1968] 2 QB 862, CA (refd)

Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo (Malaysia) Bhd [2008] 6 CLJ 1, FC (refd)

Badan Peguam Negara v Kerajaan Malaysia [2009] 2 MLJ 161; [2009] 1 CLJ 833, FC (refd)

Bushell v Hammond and others [1904] 2 KB 563, CA (refd)

Chan Yock Cher v Chan Teong Peng [2005] 4 CLJ 29; [2005] 4 AMR 693, FC (folld)

Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1; [2001] 4 AMR 3921, FC (folld)

Chu Tak Fai v PP [2007] 1 MLJ 201; [2006] 4 CLJ 931, FC (refd)

Connelly v DPP [1964] AC 1301, HL (refd)

Dato Menteri Othman bin Baginda & Anor v Datuk Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP [2004] 3 MLJ 517; [2004] 4 CLJ 157, FC (refd)

Filotek Trading Sdn Bhd v Buildcon-Cimaco Concrete Sdn Bhd [1999] 4 MLJ 268, HC (refd)

Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35, SC (refd)

Garthwaite v Garthwaite [1964] 2 All ER 233, CA (refd)

Moses Hinds and others v The Queen and another appeal [1977] AC 195, PC (refd)
Joceline Tan Poh Choo & Ors v V Muthusamy [2007] 6 MLJ 485; [2007] 5 AMR 725, FC (folld)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)
Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors [1986] 1 MLJ 166, SC (refd)
McC (A Minor), In re [1985] AC 528, HL (refd)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385; [2002] 1 AMR 1089, FC (folld)
MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun [2002] 2 MLJ 673; [2002] 3 AMR 2917, FC (folld)
Ong Thye Peng v Loo Choo Teng & Ors [2009] 4 MLJ 472; [2009] 4 CLJ 515; [2009] 1 LNS 486, FC (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (refd)
PP v Masran Abu & Ors [1971] 4 MC 192 (refd)
Queen, The v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd (1970–71) 123 CLR 361 (refd)
Raja Mokhtar bin Raja Yaakob v Public Trustee, Malaysia [1970] 2 MLJ 151, HC (refd)
Raja Prithwi Chand v Sukraj Rai AIR 1941 FC 1 (folld)
R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2) [1999] 1 All ER 577, HL (refd)
Reg v Bedwellty JJ Ex parte Williams [1997] AC 225, HL (refd)
Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753; [2008] 5 CLJ 201, FC (refd)
State of Tasmania v The Commonwealth of Australia and State of Victoria (1904) 1 CLR 329 (refd)
Taylor & Anor v Lawrence & Anor [2002] 2 All ER 353, CA (folld)
Uddin, Re, (a child) (serious injury: standard of proof) [2005] 3 All ER 550, CA (folld)

Legislation referred to

Civil Law Act 1956 s 3(1)(a)
Courts of Judicature Act 1964 ss 16, 17, 87, 96
Criminal Procedure Code ss 418A, 51A(1)(b), (1)(c), 112
Federal Constitution arts 3, 4, 8(2), 121, 121(1A), (2), (2)(a), 128, 128(3), 130, 160(2)
Interpretation Acts 1948 and 1967 ss 3, 87
Penal Code s 377B
Rules of the Federal Court 1995 rr 107, 137
Rules of the High Court 1980 O 53

Appeal from: Criminal Appeal Nos W-09–71 of 2009 and W-09–74 of 2009 (Court of Appeal, Putrajaya)

Karpal Singh (Param Cumaraswamy, SN Nair and Marisa Regina with him) (Karpal Singh & Co) for the applicant.
Mohd Yusof bin Hj Zainal Abiden (Mohamad Hanafiah bin Zakaria, Nordin bin Hassan, Wong Chiang Kiat, Noorin bt Badaruddin and Farah Azlina bt Latif, SFC with him) (Solicitor General II, Attorney General's Chambers) for the respondent.
Teoh Lib Peng watching brief for Bar Council.

Zulkefli FCJ:

[1] I have read the judgment in draft of my learned sister, Heliliah bt Mohd Yusof FCJ and I agree with the conclusion reached by Her Ladyship that the applicant has failed to meet the requirements of r 137 of the Rules of the Federal Court 1995 ('r 137') and consequentially the applicant's application has been dismissed with costs. I would like to state my views in dismissing the applicant's application with particular reference to the scope and purpose of r 137 as follows.

[2] I am of the view r 137 cannot be construed as conferring upon the Federal Court the statutory jurisdiction or the new jurisdiction to hear any application to review its own decision. However, under r 137 the Federal Court still has the limited 'inherent power' or 'inherent jurisdiction' in order to maintain its character as a court of justice to hear any application or to make any order to prevent injustice or to prevent an abuse of the process of the court. There is an important difference between the nature of the inherent jurisdiction of the court and its statutory jurisdiction. The source of the statutory jurisdiction of the court is the statute itself which will define the limits within which such jurisdiction is to be exercised, whereas the source of the inherent jurisdiction of the court is derived from its nature as a court of law and that the limits of such jurisdiction are not easy to define (see Sir Jack Jacob, QC *The Inherent Jurisdiction of the Court* (1970) Current Legal Problems 23).

[3] On the proposition that r 137 does not confer new jurisdiction, Arifin Zakaria FCJ (as he then was) in the case of *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753, had correctly concluded at p 767 as follows:

> I agree with the learned Chief Justice that this application ought to be dismissed for the reasons given by him. In this regard I am of the opinion that it is necessary for us to consider the purpose and scope of the Rules of the Federal Court 1995 ('RFC'). This is found in s 16 of the Courts of Judicature Act 1964 ('CJA'). *Briefly it provides that the purpose for which rules may be made by the Rules Committee appointed under s 17 of the CJA is for regulating the practice and procedure to be*

followed by the Federal Court in all causes and matters whatsoever in or with respect to which the Federal Court has for the time being jurisdiction … But as a subsidiary legislation it cannot exceed the powers conferred by the statute pursuant to which it is made, therefore, it cannot purports to confer new jurisdiction where none existed before or enlarge the jurisdiction, or create or alter substantive rights …

Therefore, it will be ultra vires the powers of the Rules Committee to attempt to confer on the Federal Court the power to deal with a matter which is outside its jurisdiction. This rule must strictly be confined to procedural matter only.

(Emphasis added.)

[4] It is to be noted that the term 'inherent jurisdiction' and 'inherent power' have been referred to interchangeably in a number of earlier decided cases under r 137. There is a difference between the words 'jurisdiction' and 'power' in law. Jurisdiction denotes the scope of authority over a subject matter the court may deal with. The court may then exercise its power in relation to and pursuant to that jurisdiction. The learned solicitor general appearing for the respondent in this application had adopted the stand that r 137 does not confer new jurisdiction on the Federal Court and for this reason the said r 137 cannot be invoked at all by the court to review its own decision. The learned solicitor general if I understood him correctly in his submission seemed to be concerned of the absence of the source of jurisdiction and power that can be attributed to r 137. On this ground alone he contended that the applicant's application ought to be dismissed.

[5] With respect I could not agree with the learned solicitor general that r 137 cannot be invoked at all to review its own decision. Notwithstanding that r 137 does not confer a new jurisdiction or a statutory jurisdiction, I am of the view that the term 'inherent power' used in r 137 should be taken to mean referring to the judicial powers of the Federal Court itself. On this point I agree with the views expressed by Heliliah Mohd Yusof FCJ in her judgment that a certain reserve of power intrinsically remains with the Federal Court and as the apex court of the Judiciary it has to be the organ to deal with any 'injustice' or 'abuse of process'. It is in that limited sense that when such an application is made under r 137 that the Federal Court can be said to be exercising its 'inherent power' or 'inherent jurisdiction' to review its own decision as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[6] The law is now settled that the inherent powers of this court under r 137 could not be invoked to review its own decision on its merits. Such inherent power is strictly confined to procedural matters only. In *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo (Malaysia) Bhd* [2008] 6 CLJ 1, the limit of r 137 was explained by Abdul Hamid Chief Justice at p 6 as follows:

> In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. *In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion.*

(Emphasis added.)

[7] This court in the case of *Chan Yock Cher v Chan Teong Peng* [2005] 4 CLJ 29 at p 45 further explained that:

> On the other hand, no leave to review should be given where the previous order is challenged on its merits, whether on facts or in law. Merely because the panel hearing the application is of the view that an important piece of evidence had not been given sufficient weight or that the current panel disagrees with the interpretation or application of a certain provision of the law is not a sufficient reason for the court to set aside its previous order.

[8] In *Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161 at p 171; [2009] 1 CLJ 833 at p 845, Zaki Tun Azmi Chief Justice reiterated and clarified further the confine of r 137 in the following words:

> In *Asean Security Papers Mills*' case, I have listed out the circumstances where discretion under r 137 can be exercised. *If one were to go through all the cases, injustice could be clearly seen even before going into the merits of each case. It cannot be applied where a decision of this court is only questioned, whether in law or on the facts of the case.*

(Emphasis added.)

[9] In India, where the Constitution has a specific provision empowering the Supreme Court to review its own decision, yet, the court held that there ought to be no review on its merits as stated in the case of *Raja Prithwi Chand v Sukraj Rai* AIR 1941 FC 1 at p 2 as follows:

> This court will not sit as a Court of Appeal from its own decisions, nor will it entertain applications to review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision. It would in our opinion be intolerable and most prejudicial to the public interest if cases once decided by the court could be re-opened and re-heard.

[10] His Lordship Zaki Tun Azmi PCA (as he then was) in the case of *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia)*

Bhd had succinctly laid out the limited or exceptional circumstances where the court has exercised its discretion to invoke r 137, inter alia, as follows:

(a) That there was a lack of quorum eg the court was not duly constituted as two of the three presiding judges had retired (*Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 AMR 3921).

(b) The applicant had been denied the right to have his appeal heard on merits by the appellate court (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 AMR 1089).

(c) Where the decision had been obtained by fraud or suppression of material evidence (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 AMR 2917).

(d) Where the court making the decision was not properly constituted, was illegal or was lacking jurisdiction, but the lack of jurisdiction is not confined to the standing of the quorum that rendered the impugned decision (*Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, & another application* [2005] 3 MLJ 1; [2004] 5 AMR 709).

(e) Clear infringement of the law (*Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417; [2005] 1 AMR 501).

(f) It does not apply where the findings of this court is questioned, whether in law or on the facts (since these are matters of opinion which this court may disagree with its earlier panel) *(Chan Yock Cher v Chan Teong Peng* [2005] 4 AMR 693; [2005] 4 CLJ 29).

(g) Where an applicant under r 137 has not been heard by this court and yet through no fault of his, an order was inadvertently made as if he had been heard (*Raja Prithwi Chand v Sukhraj Rai* AIR 1941 FC 1).

(h) Where bias had been established (*Taylor & Anor v Lawrence & Anor* [2002] 2 All ER 353).

(i) Where it is demonstrated that the integrity of its earlier decision had been critically undermined eg where the process had been corrupted and a wrong result might have been arrived at (*Re Uddin (a child) (serious injury: standard of proof)* [2005] 3 All ER 550).

(j) Where the Federal Court allows an appeal which should have been consequentially dismissed because it accepted the concurrent findings of the High Court and Court of Appeal (*Joceline Tan Poh Choo & Ors v V Muthusamy* [2007] 6 MLJ 485; [2007] 5 AMR 725).

[11] Based on the principles enunciated and the guidelines set out in the above mentioned cases and applying them to the grounds upon which the applicant is seeking for the review of the present case, it is abundantly clear

A the applicant had intended to move this court to review the issues on their merits. This is clearly outside the purview of r 137. In the present case the earlier panel of this court had already delivered a judgment and had addressed all the issues canvassed by both parties in the appeal before them. More importantly, it must be observed that the due process of the law had taken its
B course whereby the notice of motion filed by the applicant at the High Court had gone through a hearing and two appeal processes before the Court of Appeal and finally culminating with the Federal Court. The applicant had exhausted his legal remedies. On this point this court had on many occasion expressed its view that there must be finality to deciding any dispute and it
C cannot be reviewed ad infinitum.

[12] For the reasons above stated I would dismiss the applicant's application.

D **Heliliah FCJ:**

[13] Enclosure 20(a) is a notice of motion dated 2 February 2010 filed by the applicant pursuant to r 137 of the Rules of the Federal Court 1995 for
E an order for this court to review its judgment delivered on 29 January 2010 (FC judgment dated 29 January 2010). The application has been dismissed unanimously. General reasons were given orally and are alluded to at the end of this judgment. The detailed grounds are the following.

F **[14]** The application was prefaced by the following events. The applicant Dato' Seri Anwar Ibrahim was first charged in the Sessions Court of Kuala Lumpur on 7 August 2007 with an offence under s 377B of the Penal Code. However pursuant to a certificate issued by the public prosecutor under s 418A of the Criminal Procedure Code ('CPC'), the case was transferred to
G the High Court of Kuala Lumpur. This move was strenuously opposed by the applicant until it was disposed of by the Court of Appeal on 2 July 2009.

[15] The applicant then filed a notice of motion for an order to compel the respondent and/or other persons having care custody and control to produce
H to the applicant documents, certain materials and items. The documents materials and items are referred to in the Federal Court judgment dated 29 January 2010:

(a) the original CCTV recordings allegedly taken from the guardhouse and
I lifts in Block 11 of Desa Damansara Condominium and any other locations fitted with CCTVs within the condominium;

(b) DNA samples — the original samples, original swabs taken off the complainant, slides made during testing, pictures of the slides and the 'Electro Pherogram' for each sample;

(c) the notes of the chemists who did the testing and analysis on the DNA samples;

(d) the notes from all the doctors who examined the complainant at Hospital Kuala Lumpur;

(e) the doctors' notes, photographs and report of the proctoscopy or other tests done on the complainant at Hospital Kuala Lumpur;

(f) the report from Hospital Pusrawi and doctor's notes on the examination done on the complainant;

(g) the video recording of statement by the complainant on 30 June 2008;

(h) witness statements under s 112 of the CPC of:

(i) the complainant;

(ii) Hj Hassanudin Abdul Hamid;

(iii) Nursham;

(iv) Muhamad Rahimi bin Osman;

(v) Mohd Rasid Mohd Rosli;

(vi) Dr Osman Abdul Hamid; and

(vii) any other witnesses not listed above.

(i) copies of all documents and items which will be produced by the respondent under s 51A(1)(b) of the CPC;

(j) a statement of facts favouring the appellant under s 51A(1)(c) of the CPC;

(k) all documents and items that will not be used by the respondent in the trial;

(l) a list of the prosecution witnesses; and

(m) alternatively, there was a prayer for an order that the respondent do disclose to him and/or that the applicant be allowed to inspect, all the documents and items mentioned above.

[16] On 16 July 2009 the learned High Court judge after having heard both parties made an order (the HC order 16 July 2009) for the respondent to comply with almost all of the prayers in the application.

[17] The respondent being dissatisfied with the HC order 16 July 2009 appealed to the Court of Appeal against that decision. The applicant also appealed against that part of the HC order 16 July 2009 that refused some parts of the applicant's prayers.

[18] At the Court of Appeal apart from the substantive appeals and cross appeal the applicant raised a preliminary objection that the Court of Appeal was not seized with the jurisdiction to hear the appeal as the HC order 16 July 2009 was not in the nature of an appealable order. The Court of Appeal however dismissed the preliminary objection. On the substantive appeals, the cross appeal filed by the applicant was dismissed, while the appeal of the respondent was allowed in parts.

[19] The applicant also having been dissatisfied with the decision of the Court of Appeal then filed three notices of appeal before this court in respect of the following:

(a) the decision of the Court of Appeal on the preliminary objection;

(b) the decision of the Court of Appeal in allowing the respondent's appeal; and

(c) the decision of the Court of Appeal in dismissing the applicant's cross-appeal.

The applicant as the appellant in the three appeals before this court was heard on 20 January 2010. This court then delivered its judgment on 29 January 2010 whereby all the three appeals of the applicant (as the appellant) were dismissed and the findings of the Court of Appeal affirmed. In other words the appeals of the applicant have been decided on merits.

[20] The learned solicitor general ('SG') for the respondent in opposing the application advanced the following issues:

(a) r 137 of the Rules of the Federal Court 1995 ('RFC');

(b) the doctrine of finality;

(c) the scope and purpose of r 137 of the RFC;

(d) r 137 cannot be invoked to review decision on merit.

Issues (a), (c), (d) are interwoven while issue (b) forms part of the basis for which an appeal disposed of on its merit should no longer be reopened. These issues will necessarily have to be dealt in combination and not separately.

[21] However the fulcrum of the decision that has been attained that is to dismiss the application is pivoted on the principal issue advanced by the learned SG that is the scope of r 137. Before embarking on the principal issue I am constrained to observe that the position adopted by the respondent in this application is diametrically opposed to the position adopted by senior federal counsel ('SFC') in *Badan Peguam Negara v Kerajaan Malaysia* [2009]

2 MLJ 161; [2009] 1 CLJ 861. Three grounds of judgment were furnished in that case but in one, the following has been noted (at p 185 (MLJ); 861 (CLJ)):

> Before we conclude, there is a point of considerable importance that we strongly feel must be addressed. It has to do with the jurisdiction of this court to review its own decisions. We are aware that the jurisdiction was conceded — and wrongly to — by learned senior federal counsel. According to her there is a line of authority that has declared the existence of review jurisdiction.

[22] While SFC concedes that the Federal Court in this aforementioned case has jurisdiction to review its own decision, in the present application before us this position is refuted. Such incompatible position starkly invites some consideration of r 137 of the RFC not with the object of revisiting earlier decision but to appraise the impact of r 137 of the RFC since the ultimate purpose of litigants in invoking r 137 of the RFC cannot be other than for the sole purpose of inviting the Federal Court to review its decision after the completion of a hearing on an appeal. In any event if there is no jurisdiction per se, waiver or consent does not 'confer' jurisdiction.

[23] The learned SG contends that r 137 of the RFC does not confer new jurisdiction on this court and consequentially cannot be invoked to review its own decision on merit. The SG contends that this argument is premised on the present art 121(2) of the Federal Constitution whereby the Federal Court can hear appeals from the Court of Appeal in civil and criminal cases. The Federal Court has exclusive jurisdiction to determine any question whether a law (made by Parliament or the legislative of any state) is invalid, and to determine any dispute between states or between the federation and the state (arts 121(2), 128). The Federal Court is also vested, pursuant to art 130 of the Federal Constitution, jurisdiction that is advisory in nature in relation to questions referred to the Federal Court by the Yang di-Pertuan Agong.

[24] In *Anisminic Ltd v Foreign Compensation Commission and another* [1968] 2 QB 862, Lord Diplock stated:

> 'Jurisdiction' is an expression which is used in a variety of senses and takes its colour from its context.

[25] In *In re McC (A Minor)* [1985] AC 528, the House of Lords was interpreting the term 'without jurisdiction'. In his speech Lord Bridge said:

> There are many words in common usage in the law which have no precise or constant meaning. But few, I think, have been used with so many different shades of meaning in different contexts or have so freely acquired new meanings with the development of the law as the word jurisdiction.

Consider two extremes of a very wide spectrum. Jurisdiction meant one thing to Lord Coke in 1613 when he said the *Marshalsea Case* (1613) 10 Co Rep 68b at p 76(a):

> when a court has jurisdiction of the cause, and, proceeds inverso ordine or erroneously, there the party who sues, or the officer or minister of the court who executes the precept or process of the court, no action lies against them. But when the court has not jurisdiction of the cause, there the whole proceeding is coram non judice, and actions will lie against them without any regard of the precept or process ...

The Court of the Marshalsea in that case acted without jurisdiction because, its jurisdiction being limited to members of the King's household, it entertained a suit between two citizens neither of whom was a member of the King's household. Arising out of those proceedings a party arrested 'by process of the Marshalsea' could maintain an action for false imprisonment against, inter alios, 'the Marshal who directed the execution of the process'. This is but an early and perhaps the most quoted example of the application of a principle illustrated by many later cases where the question whether a court or other tribunal of limited jurisdiction has acted without jurisdiction (coram non judice) can be determined by considering whether at the outset of the proceedings that court had jurisdiction to entertain the proceedings at all. So much is implicit in the Lord Coke's phrase 'jurisdiction of the cause'.

At the other end of the spectrum, jurisdiction meant something entirely different to the majority of Your Lordships' House who, in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, decided that the commission, having misconstrued the order in Council which it was required to apply, and therefore asked itself the wrong question, had so far exceeded its jurisdiction that a purported decision of the commission was a nullity which escaped the statutory prohibition imposed by s 4(4) of the Foreign Compensation Act 1950 that 'the determination by the commission of any application made to them under this Act shall not be called in question in any court of law'.

[26] That the term 'jurisdiction' has diverse shades of meaning was again addressed in *Reg v Bedwellty JJ Ex parte Williams* [1997] AC 225. In his speech Lord Coke observed:

> In approaching the appeal I will avoid as far as reasonably practicable that which the certified question successfully avoids, namely the use of the term 'jurisdiction'. It is a term used in a number of different senses, and possibly its popularity and convenience are partly due to its very ambiguity. For instance one can say, without any distortion of ordinary language, (i) that a superior court of general jurisdiction, such as the High Court of Justice, has jurisdiction to determine, subject to any provisions for appeal, the limits of its own jurisdiction; (ii) that the authorities now establish that the Queen's Bench Division of the High Court has normally in judicial review proceedings jurisdiction to quash a decision of an inferior court, tribunal or other statutory body for error of law, even though the error is neither apparent on the face of the record nor so serious as to deprive the body of

jurisdiction in the original and narrow sense of power to enter on the inquiry and to make against persons subject to its jurisdiction the kind of decision in question; and (iii) that the second proposition may often be otherwise expressed by saying that the body acts outside its jurisdiction if it asks itself the wrong questions. Such familiar propositions illustrate some (but not all) of the diverse shades of meaning which the term can bear.

[27] In this context an opinion of Diplock LJ in *Garthwaite v Garthwaite* [1964] 2 All ER 233 is relevant wherein it is explained:

As was pointed out by Pickford LJ in *Guaranty Trust Co of New York v Hannay & Co* (25), the expression 'jurisdiction' of a court may be used in two different senses, a strict sense (which he regarded as the only correct one) and a wider sense. I think, with respect, that he defined the strict sense too narrowly, for it would not embrace the court's lack of jurisdiction to entertain a suit based on the personality of a party, as for instance against a foreign sovereign or ambassador. However, it is important for the purposes of the present appeal to distinguish between the two senses in which the expression is used. In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed on its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject-matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its 'jurisdiction' (in the strict sense), or as to the circumstances in which it will grant a particular kind of relief which it has 'jurisdiction' (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances. This distinction between the strict and the wider meaning of the expression 'jurisdiction' was of little importance in the case of the superior courts so long as they did not owe their origin to statute, for there was no need to distinguish between non-existence of a power and settled practice not to exercise an existing power. *However, in the case of courts created by statute, as the Supreme Court of Judicature, comprising the High Court and the Court of Appeal, has been since 1873, the court has no power to enlarge its jurisdiction in the strict sense, but it has power to alter its practice proprio motu within the limits which it imposes on itself by the doctrine of precedent, subject, however, to any statutory rules regulating and prescribing its practice and procedure made pursuant to any rule-making power contained in the statute*.

After having given a general perusal to the term 'jurisdiction' as above, the submission of the SG is to be considered.

[28] The application before us has arisen out of the disposal of an appeal in the exercise of its appellate jurisdiction and that jurisdiction is in accordance with the provisions of art 121(2)(a) read with art 128(3) of the Federal Constitution.

[29] In this context it cannot therefore be the position that there is supplemented to the appellate jurisdiction of the Federal Court, a new jurisdiction that is additionally a 'review' jurisdiction conferred by the rules committee of the court where the status of the rules remains a subsidiary legislation. This observation is specifically directed to the contention of learned lead counsel for the applicant when he referred to *Taylor & Anor v Lawrence & Anor* [2002] 2 All ER 353 where it was held that the Court of Appeal had a 'residual jurisdiction' to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The Court of Appeal in that case had before it issues pertaining to bias and was in fact considering whether it had 'power' to reopen an appeal after it had given a final judgment. However the judgment of Lord Woolf although made in the context of a Court of Appeal, referred to the speech of Lord Browne-Wilkinson in *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 where the general principle stated by Lord Browne-Wilkinson is as follows:

> ... it must be that Your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of the House. *There is no relevant statutory limitation on the jurisdiction of this House in this regard and therefore its inherent jurisdiction remains unfettered*. In *Cassell & Co Ltd v Broome (No 2)* [1972] 2 All ER 849; [1972] AC 1136 Your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point. However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

(Emphasis added.)

[30] Lord Woolf then proceeded to opine:

> Those words of Lord Browne-Wilkinson are clearly focusing on the special *position of the House of Lords as a final appellate court*. They cannot therefore automatically be applied to this court.

[31] It is implicit in the contention of the SG that the Federal Court being vested with jurisdiction as particularised above, pursuant to the Federal Constitution, in its appellate jurisdiction (as opposed to its original jurisdiction), and derived from various provisions of the Courts of Judicature Act 1964, that the Federal Court is therefore not to transgress the very provisions by which the organ has been established. This has to be the purpose for which the SG referred to us the judicial statement of Abdul

Hamid Omar CJ (Malaya) (as he then was) in *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166, the material particulars of which are:

> There is certainty no provision which confers jurisdiction on a Supreme Court to hear and determine appeals from a decision given in an appeal it has already heard and disposed of. Where, therefore, a final decision has been delivered an appeal is in effect heard and disposed of. In other words, it has brought to a final conclusion and there being the case, the Supreme Court has no power to reopen, re-hear and re-examine its reason for whatever purpose.

On analysis, this submission of the SG also mirrors his contention where he submitted that this court has 'steadfastly upheld the cardinal principle of finality underlying the orderly conduct of any proceedings in a court of law and most importantly, the respect and due recognition accorded to a judgment from the apex court of this country'. Nevertheless to all intents and purposes r 137 has already been promulgated as a distinct rule and given effect to.

[32] Rule 137 is declaratory in nature and stipulates:

> 137 Inherent powers of the Court
>
> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or an abuse of the process of the Court.

[33] An empirical survey of judicial precedents reveals that the expressions 'inherent jurisdiction' and 'inherent powers' have been given due judicial consideration. The jurisprudential approach varies and in the context of the issue raised during the hearing of the application before us, an appreciation has to be given to previous judicial statements. In *Filotek Trading Sdn Bhd v Buildcon-Cimaco Concrete Sdn Bhd* [1999] 4 MLJ 268 Abdul Hamid Mohamad J (as he then was) had the occasion to address questions pertaining to 'inherent powers' although the proceedings adjudicated upon pertain to the striking off in a winding up petition. I would refer to the relevant parts of His Lordship's judgment which in my view echoes the questions that lurk behind the terms 'inherent powers' or 'inherent jurisdiction'. The portions are:

> As I was finalising this judgment the case of *Ngan Tuck Seng & Anor v Ngan Yin Groundnut Factory Sdn Bhd* [1999] 5 MLJ 509 was reported. In that case, a petition to wind up the company was filed by two directors. The respondent and the other two directors applied to have the petition struck out on the ground that it was an abuse of the process of the court under the inherent jurisdiction of the court.

A On the preliminary issue whether the court has inherent jurisdiction Clement Skinner JC relied on the Federal Court case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 and held that the court had inherent jurisdiction to hear and determine the application. The learned judicial commissioner, summarised the effects of the Federal Court judgment in *R Rama* B *Chandran v The Industrial Court of Malaysia* as follows:

> It is clear from the decision in *R Rama Chandran* that inherent jurisdiction, being part of the common law powers enjoyed and possessed by a High Court, of which a companies court is one, is a separate and distinct source of C jurisdiction enjoyed by a court independent of any enabling statute or legislation. It follows therefore that on Malaysia Day, when by virtue of art 121 of the Federal Constitution, the High Court of Malaya and of Sabah and Sarawak came into existence, they came invested with that reserve fund of powers necessary to fulfill themselves as superior courts in Malaysia. And, as pointed out in *R Rama Chandran*, they enjoyed *such powers as a separate and* D *distinct source of jurisdiction from the statutory powers* of the court. Accordingly, I have no hesitation in holding that a companies court does exercise inherent jurisdiction.

Going back to *R Rama Chandran*'s case, the first thing that should be noted is that E in that case the appellant had applied for judicial review ie certiorari to quash the order of the Industrial Court. The order was quashed. The High Court in this country are clearly conferred with such powers by para 1 of the Schedule to the Courts of Judicature Act 1964 — see judgment of Eusoff Chin (Chief Justice), at p 181G. So, the court did not have to rely on its 'inherent jurisdiction' to issue a writ of certiorari to quash the Industrial Court's decision. However, the issue of 'inherent F jurisdiction' became relevant when the court was considering whether or not to stop there, or award consequential relief. On this issue Wan Yahya FCJ delivered a dissenting judgment holding that the Federal Court had no jurisdiction to proceed to hear and award compensation after the Industrial Court's order had been quashed. The majority held otherwise.

G I am only concerned with the grounds forwarded in support of the view that the courts in this country have 'inherent jurisdiction' similar to the courts in England.

In his second or 'rebuttal judgment', (rebutting Wan Yahya FCJ's dissenting judgment, the first of its kind in this country as far as I know), Edgar Joseph Jr FCJ H quoted at length from an article by Sir Jack Jacob QC, the former Senior Master of the Supreme Court in the United Kingdom in his article *The Inherent Jurisdiction of the Court* [1970] Current Legal Problems 23. Part of them have been reproduced by Clement Skinner JC in *Ngan Tuck Seng & Anor v Ngan Yin Groundnut Factory Sdn Bhd*. I do not intend to reproduce them again. The effects are aptly summarised by the learned judicial commissioner in the passage I have reproduced earlier.

I Sir Jack Jacob was speaking about the common law of England and the courts in England. Before the common law of England becomes applicable in this country it must pass the test provided by s 3 of the Civil Law Act 1956.

...

Which federal law provides for inherent jurisdiction? The only provision I can find is O 92 r 4 of the RHC 1980, that too, if RHC 1980 can be considered as a federal law (I do not include the provision of the Schedule to the Courts of Judicature Act 1964 as they are specific powers mentioned therein (eg res judicata, vexatious litigants) conferred on the High Courts by the federal law and therefore cannot be said to fall within the meaning of 'inherent jurisdiction').

However Edgar Joseph Jr FCJ in *R Rama Chandran* was of the view that O 92 r 4 of the RHC 1980 only served as a reminder and confirmation of the common law powers of the court which the courts always had even without that provision. The learned judge said, at pp 238–239:

> In my view, O 92 r 4 is a unique rule of court for while it neither defines nor gives jurisdiction, yet it serves as a reminder and confirmation — lest we forget — of the common law powers of the court, which are residuary or reserve powers and a separate and distinct source of jurisdiction from the statutory powers of the court.
>
> In other words, even without O 92 r 4, the inherent powers of the High Court would still be there. In the United Kingdom, for instance, there is no provision in the Supreme Court Rules, equivalent to our O 92 r 4, yet the inherent powers occupy a position of great importance in the High Court there as the article by Sir Jack Jacob amply demonstrates. And, the Court of Appeal there also exercises an inherent jurisdiction (see *Aviagents v Balstravest Investment Ltd* [1966] 1 WLR 150) notwithstanding the absence of any provision in any written law or rule of court providing for inherent powers.

[34] A further response to the above issue could be discerned in one of the judgments in the case of *Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161; [2009] 1 CLJ 833. In that case r 137 was directly being considered. I would refer to the opinion of Gopal Sri Ram JCA on the issue of jurisdiction by mentioning those portions relevant to the issue in this application. The following are the passages:

> [62] The starting point is to identify the sources from which this court derives its jurisdiction. In our judgment there are three. First, the Federal Constitution; second, Acts of Parliament; third, the common law. Let us take the Constitution. Articles 128 and 130 are the relevant provisions.
>
> ...
>
> [63] Taking a moment aside, we note that the expression used by art 128(3) is 'federal law' in relation to this court's appellate jurisdiction. This is defined by art 160(2) as follows:
>
> Federal law means
>
> (a) any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII; and

(b) any Act of Parliament.

Put shortly, federal law means any pre-Merdeka law and any Act of Parliament. You will notice that the definition is not open-ended. It is fixed. It says 'federal law means'. It follows that it is not open for a court to include any other written law within the definition. So, rules of court made under the Courts of Judicature Act are, by constitutional definition not federal law. The contrary view expressed in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2004] 3 MLJ 517; [2004] 4 CLJ 157 is therefore, with great respect, clearly not correct.

[65] We turn next to the second source of this court's jurisdiction, namely Acts of Parliament. Principal amongst these is the Courts of Judicature Act 1964 which in ss 81–83 deals with the original jurisdiction, in s 94 with the referral jurisdiction (which is placed under the heading of the original jurisdiction) and in ss 86–102 with the appellate jurisdiction. Again, there is no reference to any jurisdiction to review. Other Acts, for example the Criminal Procedure Code in habeas corpus cases and the Election Offences Act 1954 provide for leapfrog appeals to this court. But there is no statute that confers jurisdiction upon this court to review its own decisions. Compare this with s 114 of the Indian Code of Civil Procedure which expressly confers power on a court to review its own decisions in certain circumstances. So, statute is also not a source of the review jurisdiction.

[66] Last, the common law jurisdiction. At common law, every court has an inherent jurisdiction to hear applications, make such orders and give such directions for the advancement of justice and to prevent an abuse of its process. And that brings us to r 137 of the Rules of the Federal Court upon which reliance has consistently been placed to exercise the review jurisdiction. The rule reads as follows:

> 137 For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[67] It has been repeatedly said that the rule does not confer any new jurisdiction but is merely declaratory of the jurisdiction inherent in it at common law. It has also been held that resort to the inherent jurisdiction cannot be had in the face of express statutory provisions. See *Cotton Corporation of India Ltd v United Industrial Bank Ltd* AIR 1983 SC 1272. In *Hunter v Chief Constable* [1982] AC 529, Lord Diplock described inherent jurisdiction as something:

> Which any court of justice must possess to prevent *misuse* of its *procedure* in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.

...

[70] The question that therefore arises is whether the power of a court to review

its own judgment is a common law power under the inherent jurisdiction. In our judgment this is a matter of classification. And the courts have classified the jurisdiction of a court to review its own decisions as statutory. Just as has been done with appellate and reversionary jurisdiction. In short, the inherent jurisdiction of any court does not include a power to review its decisions. In *Fernandes v Ranganayakulu* AIR 1953 Mad 236, Ramaswami J said:

> So far as the invocation of the inherent powers of court is concerned, it has been held repeatedly and has now become well settled law that the power to review is not an inherent power of a judicial officer but such a right must be conferred by statute. This is based upon the common sense principle that prima facie a party who has obtained a. decision is entitled to keep it unassailed unless the Legislature has indicated the mode by which it can be set aside. A review is practically the hearing of an appeal by the same officer who decided the case. Therefore, the course of decisions in this country has been to the effect that a right to review is not an inherent power: see *David Nadar v Manicka Vachaka Desika Gnana Sambanda Pandara Sannathi* 33 Mad 65; *Prayag Lal v Jai Narayan Singh* 22 Cal 419; *Baijnath Ram Goenka v Nand Kumar* 34 Cal 677 and *Anantharaju Shetty v Appu Hegade* 37 MLJ 162.

[71] So when may r 137 be resorted to? The answer in our respectful view is that it may be resorted to only in cases where a procedural injustice has been occasioned.

...

[77] To sum up, this court has no inherent jurisdiction to review its earlier decision save on the very limited ground (i) that it contains clerical mistakes that makes its order unclear to such an extent that it will cause a miscarriage of justice; and (ii) that one or more of the parties have suffered procedural unfairness in the sense already discussed in the making of an order, eg, because through no fault of his, he was never heard before the order was made or because decision on an appeal is tainted by a real danger of bias or a reasonable apprehension or suspicion of bias on the part of one or more members of the court who handed down the impugned judgment.

[78] Some may see the view we take of the law on the subject under discussion as purchasing finality at the expense of justice. To them we can do no better than commend the words of Lord Simon of Glaisdale in *The Ampthill Peerage* [1977] AC 547 at p 576:

> ... the fundamental principle that it is in society's interest that there should be some end to litigation is seen most characteristically in the recognition by our law — by every system of law — of the finality of a judgment. If the judgment has been obtained by fraud or collusion it is considered a nullity and the law provides machinery whereby its nullity can be so established. If the judgment has been obtained in consequence of some procedural irregularity, it may sometimes be set aside. But such exceptional cases apart, the judgment must be allowed to conclude the

matter. That, indeed, is one of society's purposes in substituting the lawsuit for the vendetta. Sometimes it is the parties to the litigation and those who claim through them who are bound by the judgment; but sometimes it is the whole world which must accept the decision.

[35] I would pause to express two observations here. The reference to the *The Ampthill Peerage* [1977] AC 547 is yet another emphasis on the requirements of finality. In addition as already mentioned earlier on, Gopal Sri Ram JCA had stated that it was wrong for the SFC to concede jurisdiction if indeed there was none.

[36] However apart from the aforementioned there is further need to pay heed to other opinions of the learned judges of this court in several other decisions. In my considered opinion there has been a stage where the term 'inherent jurisdiction' has been treated coterminous with 'inherent power'. Both terms in addition appeared to have been referred to interchangeably.

[37] I would endeavor only to list the judicial precedents in the following order:

(a) *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 CLJ 61 dated 10 August 2001.

(b) *Megat Najmuddin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645 dated 8 February 2002.

(c) *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577 dated 16 May 2002.

(d) *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417; [2005] 1 CLJ 565 dated 27 August 2004.

(e) *Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, & another application* [2005] 3 MLJ 1; [2004] 4 CLJ 350 dated 3 September 2004.

(f) *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2004] 3 MLJ 517; [2004] 4 CLJ 157 dated 15 September 2004.

(g) *Chan Yock Cher v Chan Teong Peng* [2005] 4 CLJ 29 dated 28 June 2005

(h) *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201; [2006] 4 CLJ 931 dated 9 November 2006.

(i) *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201 dated 15 May 2008.

(j) *Joceline Tan Poh Choo & Ors v V Muthusamy* [2007] 6 MLJ 485; [2007] 6 CLJ 1 dated 14 September 2007.

(k) *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1 dated 22 May 2008.

(l) *Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161; [2009] 1 CLJ 833 dated 5 December 2008.

(m) *Ong Thye Peng v Loo Choo Teng & Ors* [2009] 4 MLJ 472; [2009] 4 CLJ 515; [2009] 1 LNS 486 dated 3 June 2009.

[38] Whilst having listed the numerous cases in which r 137 has been considered, I find that in order to negate the suggestion that 'inherent powers' under r 137 'confers new jurisdiction' certain specific reasons are to be cited for the purposes of explaining the evolution of r 137. I choose to embark on it by agreeing with the dissenting judgment of Abdul Hamid Mohamad FCJ (as he then was) in *Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd & another application* [2005] 3 MLJ 1; [2004] 4 CLJ 350, with regard to his statement that s 3(1)(a) of the Civil Law Act 1956 is not to be relied upon as a source of additional jurisdiction of the Federal Court. In his judgment he said:

> ... I do not think that s 3(1)(a) of the Civil Law Act 1956 is applicable. That section begins with the words: 'Save so far as other provision has been made or may hereafter be made by any written law in Malaysia ...' The jurisdiction of this court is not only provided by 'written law' but by the Constitution itself — see arts 128 and 130. More detailed provisions regarding the jurisdiction of this court are to be found in the CJA 1964 and the Rules of the Federal Court 1995. In the circumstances, we do not think that we can invoke the provision of s 3(1)(a) of the Civil Law Act 1956 *to generally introduce whatever additional jurisdictions* the common law gives to the courts in England.
>
> However, *I agree that r 137 does give the inherent powers to this court* for the purposes stated therein. I also agree with the statement of Mohamed Dzaiddin, CJ in *Chia Yan Tek* quoted by the learned CJ (Sabah and Sarawak), as a general statement. However, I am of the view that that statement should be read in the light of the facts of that case. In other words, the inherent powers that this court possesses is limited to situations where the order is a nullity either because the court making the order was not properly constituted as in *Chia Yang Tek* or *MGG Pillai* (majority judgment), or on ground of illegality or lack of jurisdiction, as in *Muniandy a/l Thamba Kaundan & Anor v D & C Bank & Anor* [1996] 1 MLJ 374; [1996] 2 CLJ 586 (FC) and *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 1 CLJ 393 (FC). To take it too far would defeat the concept of finality of a judgment and will open flood-gates as has started to happen, even with the restrictive views that the court has taken so far. The instant application is one such example.

[39] Abdul Hamid Mohamed FCJ has further explained in *Chan Yock Cher v Chan Teong Peng* [2005] 4 CLJ 29 in the following terms:

A Our first comment is that we should always bear in mind that that rule is a general rule to be found at the end of the RFC 1995 which contains rules of procedure for use in the Federal Court. The RFC 1995 provides for rules of procedure to be followed in and by the Federal Court, including what kind of applications may be made, how and when; how an appeal is to be lodged, prepared for the hearing, heard and how the judgment is to be pronounced and so on. These are all matters B of procedure. Then, as in the case of O 92 r 4 of the RHC 1980, a general provision is inserted to declare that nothing in the RFC 1995 'shall be deemed to limit or effect the inherent powers of the Court to hear any application or to make any order ...' In other words, it clarifies that whatever inherent powers the court has is preserved.

C So, in our view, it is not quite right to say that r 137 'confers' or 'gives' inherent powers to the Federal Court as has been said in a number of cases eg, *Megat Najmuddin*, *Chia Yan Teck*, *Allied Capital Sdn Bhd*, *MGG Pillai* and *Adorna Properties Sdn Bhd*. In any event, r 137 not only assumes but confirms that the Federal Court has such inherent powers, otherwise there is nothing to preserve. D

In fact, a similar view has been expressed by Edgar Joseph Jr FCJ in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147:

...

E Two points should be noted here. First, the learned judge was talking about the inherent powers of the High Court even without the provision of O 92 r 4 of the RHC 1980, *in spite of the provision or art 121(1) of the Federal Constitution*. We shall elaborate on this later.

F Secondly, the learned judge said that he had no doubt 'that in this country, the Court of Appeal and the Federal Court also exercise inherent jurisdiction'.

In *Megat Najmuddin* Steve Shim CJ (Sabah and Sarawak) was of the view that the 'the Federal Court also has the inherent jurisdiction under the common law to deal with cases with a view to preventing injustice in limited circumstances'.

G There are numerous judgments of the courts in the country on inherent jurisdiction of the courts, especially of the High Courts, whether decided prior to or after art 121(1) was amended by Act A704 that came into force from 10 June 1988 in which the words 'there shall be' were substituted for the words 'Subject to clause (2) the judicial power of the Federation shall be vested in clause (1)'. H Confining to the judgments of this court and the Supreme Court, the following are some of them: *Phileoallied Bank (Malaysia) Bhd v Bhupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 612 (FC), *Zainur bin Zakaria v Public Prosecutor* [2001] 3 MLJ 604; [2001] 3 CLJ 673 (FC), *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513; [1998] 2 CLJ 559 (FC), *Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 (FC), *Scotch* I *Leasing Sdn Bhd (in receivership) v Chee Pok Choy & Ors* [1997] 2 MLJ 105; [1997] 2 CLJ 58 (SC), *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; [1996] 1 CLJ 241, *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374; [1996] 2 CLJ 586 (FC), *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105; [1995] 2 CLJ 701 (SC), *Asia*

Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783 (SC), *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73; [1994] 3 CLJ 144 (SC), *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal* [1994] 2 MLJ 601; [1994] 2 CLJ 705 (SC), *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16; [1993] 3 CLJ 606 (SC), *Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679; [1993] 4 CLJ 345 (SC).

We shall only discuss three of the above-mentioned cases.

In *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p 42; [1996] 1 CLJ 241 at p 253 this court, inter alia, said:

> We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the court has power to set aside a judgment in default, despite the defendant's application being out of time if the particular circumstances of the case require the intervention of the court.

It is true that this court in that case was referring to the inherent jurisdiction of the High Court to set aside a default judgment of that court. However, it reaffirms that even the High Court has inherent jurisdiction. This, if we may add, is in spite of the provisions of art 121(1) that clearly says that '... The High Court ... shall have such jurisdiction and powers as may be conferred by or under federal law'. In this respect, it should be noted that art 128(3) that talks about jurisdiction of the Federal Court is differently worded, thus:

> (3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

First, this provision talks only about 'jurisdiction' but not 'powers'. Secondly, it is only in respect of appeals, ie, which appeals may come from the Court of Appeal and which appeals may come direct from the High Court or the judge thereof, all of which as may be provided by federal law. Unlike art 121(1), art 128(3) does not talk about the general jurisdictions and powers of the Federal Court, nor about applications or orders.

In *Muniandy a/l Thamba Kaundan & Anor v D & C Banks Bhd & Anor* [1996] 1 MLJ 374; [1996] 2 CLJ 586 (FC) this court again reaffirmed the High Court's inherent jurisdiction to set aside an order made by it which is a nullity.

In *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 (FC) all the judges in their separate judgments talked about the inherent jurisdiction of the High Court to set aside its own order where it 'can be proved to be null and void on the ground of illegality or lack of jurisdiction' per Mohd Azmi FCJ 'even in the absence of an express enabling provision,' per Gopal Sri Ram JCA and 'to stay any proceeding (which includes an order of execution) which is an abuse of process,' per Peh Swee Chin FCJ.

So, if the High Court, in spite of the provision of art 121(1) of the Federal Constitution still has inherent jurisdiction and powers, what more the Federal Court? It is our view therefore, that this court has the inherent jurisdiction and powers,

A including the jurisdiction to hear this application and the power to make the necessary orders. This jurisdiction and power is inherent in this court and it is reaffirmed by r 137 of the RFC 1995.

B **[40]** The judgments of this court in *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201 pointedly dispels the notion that r 137 invents a new jurisdiction. The background of the case has to be mentioned in order to highlight the reasoning of this court. The first and second respondents brought a claim in the sessions court. The sessions C court gave judgments for the respondents. The applicant appealed to the High Court which allowed the appeal. The respondents than appealed to the Court of Appeal and the appeal was allowed by the Court of Appeal. The matter should have rested there. However an application was filed praying for leave to appeal to this court or alternatively to refer the issues to the Federal D Court under its inherent jurisdiction as provided under r 137. Each of the judgment rendered in that case needs mention as separate and relevant aspects of r 137 have been elucidated. The relevant passages of the judgments of this court in *Sie Cheng Soon*'s case merit punctilious scrutiny as it is self E explanatory of the application of r 137. The judgment of Abdul Hamid Mohamad CJ states:

> [8] Before going any further I would like to state that this judgment focuses only on the issue whether issues arising from a case that commences in the F Sessions court which is not appealable to this court may be 'referred' to this court for its decision. This judgment is not concerned with a review by this court of its own judgment. So, cases on review by this court of its own judgment will not be considered, neither is the issue decided here.
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> [9] Jurisdiction of this court is given by law ie, the Constitution and statute. G The law provides that an appeal from a decision of the sessions court ends at the Court of Appeal. There is no provision anywhere in our law (putting aside r 137 of the time being) that allows such an appeal to this court. I have reaffirmed the position in *Abdul Ghaffar bin Mohd Amin*.
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> [10] Since there is no appeal to this court, does r 137 of the RFC 1995 allow H issues of law to be 'referred' to this court? With respect, I do not think so. To allow it to be done is like accepting with the left hand what the right hand rejects. After all, even appeals to this court are only on 'points of law', to use a general phrase to cover the provisions of s 96 of the CJA 1964. When a matter ends in the Court of Appeal, it ends there, the whole of it. I There has to be a provision in the law for this court to have jurisdiction to have such issues of law referred to it. We see, for example, in the Industrial Relations Act 1967 a provision that allows the Industrial Court to refer a question of law to the High Court for its determination — s 33A. See also s 16Z of the Housing Development (Control and Licensing) Act 1966.

[12] Regarding *Tan Sri Eric Chia Eng Hock* the passages from that judgment that I have quoted in *Abdul Ghaffar bin Md Amin* speak for themselves, supporting the same conclusion.

[13] It is true that in *Tan Sri Eric Chia Eng Hock* this court allowed the application of the applicant for this court to exercise its inherent jurisdiction to review the decision of the Court of Appeal even though the case commenced in the sessions court.

[17] Common law of England and the rules of equity made applicable by the Act are those concerning civil law not provided by the Act or any other written law. Once it is provided by our written law, the English common law and the rules of equity are excluded. To read that the English common law exists side by side with a law provided by statute, whether originated from the principles of the English common law or not, is to blatantly disregard the very clear opening words of s 3(1) of the CLA 1956. That cannot be right.

[18] That is in respect of civil law which to a large extent, is not codified. Criminal law, even criminal jurisdiction, has no place in the CLA 1956. It is completely outside the scope of the Act. For example, can a person be charged in Malaysia for a common law offence not codified by Malaysian law? The answer is certainly 'No'.

[19] So, it is misplaced to apply the CLA 1956 relating to civil law in a criminal case. The reasoning in *Tan Sri Eric Chia Eng Hock* is flawed and that case cannot be resorted to in support of this application.

[20] Of course, this is a civil matter. Even then, we should look closely at the opening words of s 3(1):

> 3(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall —

(a) in West Malaysia or any part thereof apply the common law of England and the rules of equity as administered in England on 7 April 1956;

[21] Law has been made that a case that begins in the Sessions court is appealable only right up to the Court of Appeal. Even though the provision is as regards appeals, what it means is that it is intended to end there. Otherwise, it would not have said so. An appeal always includes an appeal on points of law. Had Parliament intended that 'points of law' from such cases, though not appealable, may be 'referred' to this court, it would have done so, but those 'points of law' have been shut out from the door of this court by statute when it prohibits the appeals.

[22] Further, we were not shown what the common law of England was on the point, whether as on 7 April 1956 or thereafter. We were only told that the applicant was relying on *Tan Sri Eric Chia Eng Hock*'s case. Even if there was, we were not told what were the relevant statutory provisions in England that led the courts in that country to hold as such and whether the provisions of the written law in England the same as ours, bearing in mind that England does not even have a written constitution. Citing passages from judgments in England alone (even that was not done) is not sufficient. Those views may

A be expressed in view of the statutory provisions in England, which may be different from those in Malaysia. Regarding reliance on Indian judgments based on the Indian Code of Civil Procedure, I would repeat what I have said in *Abdul Ghaffar bin Mohd Amin* that it is dangerous to simply follow the views expressed by Indian judges on this issue as the Indian civil B procedure is an Act of Parliament, unlike our RFC 1995 which is a subsidiary legislation. A rule is a rule. It cannot be elevated by the court to the status of an Act of Parliament or the Constitution.

[41] In the event that there is a lingering question that r 137 being a C subsidiary legislation is also intended to confer additional new powers His Lordship negated it as follows:

[30] The application is made pursuant to r 137 of the Rules of the Federal Court. Reading that rule, it is clear that with the use of the words 'For the removal D of doubts' it is merely a reminder of the powers that are inherent in the court. That rule does not confer any extra powers.

[32] I do not think that r 137 being a subsidiary legislation could be read to override s 96(a) of the Courts of Judicature Act 1964 (all sections referred to in this judgment, unless otherwise specifically mentioned, refer to E sections of the Courts of Judicature Act). That section is clearly worded to allow the Federal Court to grant leave to appeal from any judgment or order of the Court of Appeal in respect of which the civil cause or matter has been decided by the High Court in exercise of its original jurisdiction. Section 96(b) is not relevant to the issue before us.

F [36] I do not read r 137 as meaning to provide another avenue to bring a case originating in the subordinate court to the Federal Court. On an important matter as right of appeal those sections being provisions passed by Parliament, cannot now be read as being subject to a procedural r 137 made by the rules committee. A right of appeal is a substantive right, not a G procedural right (see *Colonial Sugar Refining Ltd v Irving* [1905] AC 369 (PC)).

[42] The judgment of Arifin Zakaria FCJ discloses that this court is fully aware that the application of r 137 entails multifaceted questions that should H not, however, obscure what is the intention of having the rule inserted at the end of the rules.

[46] ... In this regard I am of the opinion that it is necessarily for us to consider the purpose and scope of the Rules of the Federal Court 1995 ('RFC'). This I is found in s 16 of the Courts of Judicature Act 1964 ('CJA'). Briefly it provides that the purpose for which rules may be made by the rules committee appointed under s 17 of the CJA is for regulating the practice and procedure to be followed by the Federal Court in all causes and matters whatsoever in or with respect to which the Federal Court has for the time

being jurisdiction. The RFC of course have the force of law as they are made pursuant to a power conferred by a statute. But as a subsidiary legislation it cannot exceed the powers conferred by the statute pursuant to which it is made, therefore, it cannot purports to confer new jurisdiction where none existed before or enlarge the jurisdiction, or create or alter substantive rights (see dissenting judgment of Seah SCJ in *Dato Mohamed Hashim Shamsuddin v Attorney-General, Hongkong* [1986] 2 MLJ 112; [1986] 1 CLJ 377; [1986] CLJ (Rep) 89 quoting Lord Davey in *Barraaclough v Brown* [1897] AC 615). In *Attorney General v Sillem* (1864) 11 ER 1200 also quoted by Seah SCJ. Lord Wrenbury LC said at p 1208:

> A power to regulate the practice of a court does not involve or imply any power to alter the extent or nature of the jurisdiction.

Similarly in *Dato' Mohamed Hashim Shamsuddin* Abdoolcader SCJ in relation to s 16 of the CJA expressed the view that:

This legislative provision clearly relates to a matter of practice and procedure with no question arising of creating or altering substantive rights or of any rules made pursuant thereto purporting per se to confer jurisdiction where none existed otherwise, and it is this specific enactment in the 1964 Act that enables the necessary rules to be spelt out to regulate the procedure for the purposes specified therein.

(See also *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147, on the powers of the rules committee).

[47] Therefore, it will be ultra vires the powers of the rules committee to attempt to confer on the Federal Court the power to deal with a matter which is outside its jurisdiction. The rule must strictly be confined to procedural matter only.

[48] It is in the light of the above considerations that r 137 ought to be construed. The said rule provides:

> 137 For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or effect the inherent powers of the court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[49] The rule merely declares '... that nothing in these Rules shall be deemed to limit or alter the inherent powers of the court ...'.

[50] The word 'court' here is defined as the Federal Court (r 2). Thus the rule does not confer an inherent power, it merely declares that the court has such a power. For the present purpose, I will not go into the issue whether there exist such an inherent power as declared by r 137.

[43] Yet another aspect of r 137 may be distilled further in *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1. The emphasis that is laid on the scope of r 137 that necessitates recapitulation as reflected in the judgment of Abdul Hamid Mohamad Chief Justice (as he then was) as follows:

> [2] The first thing that must be borne in mind is that this court is not hearing an appeal from the decision of the Court of Appeal. That, this court had done and the judgment of this court was delivered on 2 February 2007. What is before us now is an application for this court to review its own decision. The application is made under r 137 of the Rules of the Federal Court 1995 ('RFC 1995') *and/or its inherent jurisdiction*.
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> ...
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> [4] In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied *with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called 'revisiting'. Certainly, it should not be taken up in the same case by way of a review*. That had been the practice of this court all these years and it should remain so. Otherwise, there will be no end to litigation. A review may lead to another review and a further review. This court has so many times warned against such attempts ...
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> [5] Coming back to r 137 of the RFC 1995, I have dealt at length on the effect of the rule in *Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor* [2008] 3 MLJ 771; [2008] 5 CLJ 1 and in *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201. In the former case I concluded:
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> > In other words, r 137 cannot be construed as to confer any new jurisdiction to the existing jurisdiction of the Federal Court as spelt out

under the Federal Constitution, the Courts of Judicature Act and other statutes. A

[6] *However, I accept that, in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision*. I must stress again that this jurisdiction is very limited in its scope and must not be abused. I have no difficulty in accepting that inherent jurisdiction may be exercised in the following instances: B

In the passages cited above it is noted with interest His Lordship the Chief Justice referred to the application as one made under r 137 of the Rules of the Federal Court 1995 (RFC 1995) and/or its inherent jurisdiction. C

[44] The judgment of Zaki Tun Azmi PCA (as he then was) in the *Asean Security Paper Mills*' case analysed r 137 as follows:

What is r 137 D

[28] In the circumstances, should this court invoke its inherent jurisdiction to hear the case all over again? This depends on the interpretation of r 137 of the Federal Court Rules 1995.

[29] It will be noticed that the rule starts with the words 'For the removal of doubts...' It is therefore clear that this rule does not actually confer the jurisdiction to hear any application or to make any order to prevent injustice or abuse of the process of the court. It is merely a reminder that this court has that inherent jurisdiction. In fact, it was stated by Salleh Abas LP in *Dato Mohamed Hashim Shamsuddin v Attorney-General, Hongkong* [1986] 2 MLJ 112; [1986] 1 CLJ 377; [1986] CLJ (Rep) 89: E F

> It is also interesting to see how the so-called additional powers were introduced in the 1948 Ordinance by s 99A thereof. The powers were described by the section as 'the further powers' and these were 'in amplification' of the powers conferred by the Ordinance or 'inherent in any court'. Neither in derogation nor prejudicing the generality of the powers expressly conferred. *It seems therefore that even without an express provision in the statute regarding this matter, the court seems to have it and have it since the commencement of the 1948 Ordinance. It is a sort of power that should be implied or amplified from the very nature of judicial powers expressly conferred upon the court; its express mention being merely declaratory of the existence of the power*, and thus its silence does not mean the disappearance of its existence. (Emphasis added.) G H

[30] That was a case where the question was whether the High Court had the power to take evidence upon a letter of request issued by the Hong Kong High Court. There was originally such a power specifically mentioned in the I

Schedule to the Courts Ordinance 1948 but it was omitted when the Courts of Judicature Act 1964 was enacted in place of the Ordinance.

[31] The Rules of the Federal Court 1995 was made by the rules committee pursuant to delegated powers under ss 16 and 17 of the Courts of Judicature Act 1964. Section 16 sets out the areas where the Rules Committee may make rules of the court.

> 16 Rules of court may be made for the following purposes:
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> (a) *For regulating and prescribing the procedure* (including the method of pleading) and the practice to be followed in the High Court, [the Court of Appeal and the Federal Court] in all causes and matters whatsoever in or with respect *to which those courts have for the time being jurisdiction* (including the procedure and practice to be followed in the registries of those courts), and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications which are to be made to a High Court (to the Court of Appeal or to the Federal Court) shall be made; (Emphasis added.)

[32] Notice that under s 16(a) the rule making power is only in or with respect to which those courts have for the time being jurisdiction. It is not intended to confer any jurisdiction as intended to by art 128 of the Federal Constitution. The Federal Court derives its judicial function from federal laws and although the Rules of the Federal Court are federal laws, they are not intended to confer any new jurisdiction.

[33] In fact, this has been the interpretation since 1986. In *Dato Mohamed Hashim Shamsuddin v Attorney-General, Hongkong*, Abdoolcader SCJ said:

> This legislative provision clearly relates to a matter of practice and procedure with no question arising of creating or altering substantive rights or of any rules made pursuant thereto purporting per se to confer jurisdiction where none existed otherwise, and it is this specific enactment in the 1964 Act that enables the necessary rules to be spelt out to regulate the procedure for the purposes specified therein.

[34] Later in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147, the Federal Court referred to the Rules of the High Court and said at p 222 (MLJ); p 212 (CLJ):

> The next topic to be logically considered in this context, is the status of the Rules of the High Court 1980.
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> By s 17(1) of the Courts of Judicature Act 1964, powers are conferred upon the rules committee to make 'rules of court' for the purpose of regulating and prescribing the practice and procedure to be followed in

the respective courts for which each of them is constituted but within the strict limits defined by s 16.

The most decisive limitation placed on the powers of the rules committee, and indeed on the other rule-making authorities, is that they extend to regulating the 'practice and procedure of the High Court and other courts for which the rules are made. Although these powers are wide, yet it cannot be gainsaid, that they do not extend into the area of substantive law. Clearly, there is a vital distinction made between, on the one hand, substantive law, the function of which is to define, create, confer or impose legal rights and duties, and on the other hand, procedural law, the function of which is to provide the machinery, the manner or means, by recourse to which legal rights and duties may be enforced or recognised by courts of law or any tribunal seized with jurisdiction to adjudicate on a dispute before it.

[35] From the wording of s 16, it is clear that what is delegated to the rules committee is only to make rules relating to practice and procedure, and not to affect substantive rights and duties.

INHERENT JURISDICTION

[36] What then is the meaning of inherent jurisdiction? According to the *Concise Oxford Dictionary*, 'inherent' means 'existing in something, esp. as a permanent or characteristic attribute'. In the context of the law, that inherent jurisdiction is deemed to be part of the court's power to do all things reasonably necessary to ensure fair administration of justice within its jurisdiction subject to valid existing laws including the Constitution. In other words, that inherent power is found within the very nature of a court of law, unlike power conferred by statute.

[37] The *Halsbury's Laws of England*, (4th Ed) in Vol 37 at para 12 refers to 'inherent jurisdiction' as follows:

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[38] In *Bremer Vulkan v South India Shipping* [1981] 1 All ER 289 at p 295, Lord Diplock speaking on the subject of dismissing a pending action for one of prosecution said:

The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an 'inherent power' the exercise of which is within the 'inherent jurisdiction' of the High

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> Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs *must have power to do in order to maintain its character as a court of justice*. (Emphasis added.)

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[45] Having enumerated the above I wish to add that in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2004] 3 MLJ 517; [2004] 4 CLJ 157 Alauddin Mohd Sheriff FCJ (as he then was) echoed the reminder that r 137 is not an engine to enable litigants to circumvent the final disposal of cases before this court when he said:

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> Rule 137 of the Rules of the Federal Court 1995 allows the Federal Court to exercise its inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. The rule has been invoked by the Federal Court in a number of cases like *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 CLJ 61 and *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577. However, it must be observed that its application was only in limited circumstances. If there were to be a liberal application of r 137 then there would be chaos to our system of judicial hierarchy. Hence, we would think that it is on a case by case basis. Certainly it cannot be the intention of the legislature when promulgating r 137 that every decision of this court is subject to review. To do so would be against the fundamental principle that the outcome of litigation should be final.

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[46] In *Badan Peguam Negara v Kerajaan Malaysia*, Abdul Aziz Mohamad FCJ in referring to r 137 described it as the 'a reaffirmation of this court's inherent powers'.

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[47] It is borne out from the judicial precedents cited above that several aspects of the term 'inherent jurisdiction' have been judicially considered by this very court. I should point out that in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor*, the learned attorney general has outrightly contended that r 137 which has been introduced pursuant to ss 16, 17 and other provisions of the Courts of Judicature Act 1964 should be construed within the parameters of the aforesaid provisions of the Courts of Judicature Act 1964 being the parent legislation. To construe it as conferring or creating additional jurisdiction would be ultra vires the parent Act and consequentially the Federal Constitution. Yet ironically in the *Badan Peguam Negara* case, the SFC adopted a different stance by conceding jurisdiction. In proceedings before us by falling back on the former position it is an aberration of the proceedings for the very same argument to be regurgitated before us for want

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of other arguments. This should be frowned upon unless there are indeed valid and cogent points to raise to enlighten us further.

[48] In any event from the aforementioned survey it is discerned that this court has ruled that r 137 does not 'give' or confer 'jurisdiction'. Litigants are to be circumspect about the usage of the term 'jurisdiction'. Nowhere in r 137 does the word 'jurisdiction' appear as opposed to 'inherent power'.

[49] By raising the issue of the jurisdiction of the Federal Court the essential question here is the interpretation of art 121(2), a question of law, that merits consideration again. It is salutary to have proper regard to art 4 of the Federal Constitution which is both peremptory and normative. The Federal Constitution being the supreme law is the charter that spells the distribution of powers. Raja Azlan Shah FCJ (as he then was) in his usual astute approach observed in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC) at p 188:

> The Constitution is not a mere collection of pious platitude. It is the supreme law of the land embodying three basic concepts:
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> ...
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> The third is that no single man or body shall exercise complete power, but that it shall be distributed among legislative, and judicial branches of government, compendiously, expressed in modern terms that we are a government of laws, not of men.

[50] In interpreting art 121(2) the first matter to be noted is the language used namely '... and the Federal Court shall have the following jurisdiction that it is to say:

> (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof.

Article 121(2) is read with art 128(3) that states:

> (3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge therefore shall be such as may be provided by federal law.

Again notable here are the words that the Federal Court has jurisdiction to *determine appeals*. Further the jurisdiction to determine appeals shall be such as may be provided by federal law. The term 'Federal law' is expressly defined in art 160(2) of the Federal Constitution as follows:

A Federal law means —

(a) any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII; and

B (b) any Act of Parliament.

[51] It is singular to note that in art 160(2) of the Federal Constitution, the definition of 'Law' uses the word 'includes' whereas the definition of federal law uses the words 'means'. The 'Federal law' in the context of art 128(3) C therefore means the Courts of Judicature Act 1964 ('CJA 1964') for the purposes of the jurisdiction of the Federal Court to 'determine appeals' and those specific provisions are ss 87 and 96 of the CJA 1964.

D **[52]** The specific appellate jurisdictions referred to above are to be contrasted with the Rules of the Federal Court 1995.

[53] Rule 137 is part of the Rules of Federal Court 1995 made in the exercise of powers conferred by s 17 of the CJA 1964. In the Interpretation E Acts 1948 and 1967 ('Act 388') (Division One) s 3 stipulates, inter alia, that 'rules of court' means 'rules or subsidiary legislation regulating the practice and procedure of a court or courts'.

[54] In Act 388 s 87 (that appears under Division Nine) provides, inter F alia:

87 When an Act of Parliament, Ordinance of Enactment confers power on any authority to make subsidiary legislation, the following provisions shall, unless the contrary intention appears, have effect with reference to the making and operation of such subsidiary legislation:

G (a) ...

(b) ...

(c) ...

H (d) no subsidiary legislation made under an Act of Parliament or Ordinance shall be inconsistent with any Act of Parliament or Ordinance, and no subsidiary legislation made under a State Enactment shall be inconsistent with any Act of Parliament or Ordinance or Enactment.

I **[55]** The judicial precedents cited earlier have already emphasised rules promulgated pursuant to s 17 are subsidiary legislation regulating practice and procedure. Hence while bearing this in mind the ensuing question is: what is the object and/or function of r 137. In form it is incorporated in the rules to regulate practice and procedure. But what is its object and/or

function. It cannot be said to be a rule for purposes of 'determining' appeals. Since the rule itself refers to an application, it does refer to a procedure but for what purpose. In order to elicit the purport of r 137 which cannot be described as crystal clear it would be incumbent to revert once more to art 121 as the constitutional source of judicial power which has been the subject of amendments. The Federal Court itself has begun with the designation 'Supreme Court', then 'Federal Court', and back to 'Supreme Court' and now again the 'Federal Court'.

[56] In *Dato Menteri Othman bin Baginda & Anor v Datuk Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, Raja Azlan Shah Acting LP (as he then was) observed (at p 32):

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation.
>
> Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other Acts'.
>
> A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation.

And again the speech of Lord Diplock in *Moses Hinds and others v The Queen and another appeal* [1977] AC 195 is relevant although made in the context of the Constitution of Jamaica where he said:

> A written constitution, like any other written instrument affecting legal rights or obligations, falls to be construed in the light of its subject matter and of the surrounding circumstances with reference to which it was made. Their Lordships have been quite properly referred to a number of previous authorities dealing with the exercise of judicial power under other written constitutions, established either by Act of the Imperial Parliament or by order in council made by Her Majesty in right of the Imperial Crown, whereby internal sovereignty or full independence has been granted to what were formerly colonial or protected territories of the Crown. These other constitutions differ in their express provisions from the Constitution of Jamaica, sometimes widely where, as in the case of Canada and Australia, they provide for a federal structure, but much less significantly in the case of the unitary constitutions of those states which have attained full independence in the course of the last two decades. In seeking to apply to the interpretation of the Constitution of Jamaica what has been said in particular cases about other constitutions, care must be taken to distinguish between judicial reasoning which depended on the express words used in the particular constitution under consideration and reasoning which depended on what, though not expressed, is none the less a necessary implication from the subject matter and structure of the constitution and the circumstances in which it had been made. Such caution is particularly necessary in cases dealing with a federal constitution in which the

A question immediately in issue may have depended in part upon the separation of the judicial power from the legislative or executive power of the federation or of one of its component states and in part upon the division of judicial power between the federation and a component state.

B Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to C be exercised in future.

[57] With the statement of HRH Raja Azlan Shah and speech of Lord Diplock in the background it is well known that the federal legislation that D introduced amendments to art 121 of the Federal Constitution caused textual alterations to provisions that refer to the judicial branch in the distribution of powers. The textual alteration has caused a stir prompting contemplations that the amendments had hints of legislative incursions into the judicial branch. The judicial authorities cited above postulate the approach to be E taken in the interpretation of a constitution of a state where in interpreting it, it is alleviated to a standard that is different from that of innumerable statutes legislated by the legislative branch. As stated in *NS Bindra's Interpretation of Statute* (8th Ed) at p 857:

F The Constitution is the very framework of the body policy: its life and soul; it is the fountain head of all its authority, the mainspring of all its strength and power: The Executive, the Legislative, and the Judiciary are all its creations and derive their sustenance from it. It is unlike other statutes which can be at any time altered, modified or repealed. Therefore the language of the Constitution should be interpreted as if it were a living organism capable of growth and development of G interpreted in the broad and liberal spirit and not in a narrow and pedantic sense.

[58] The gravamen of the arguments of the SG is founded on the issue of jurisdiction enunciated in art 121. The current text to art 121 of the Federal H Constitution is the result of an amendment introduced by Act A704 where the words 'judicial power' seem to appear as a head note or similar to a subtitle since the title to Part IX is 'The Judiciary'. There is a need to consider the purport of Act A704 and to view art 121 in its totality after the amendments were introduced.

I **[59]** On the question of interpretation of Act A704, I wish to begin with the following, in the case of *State of Tasmania v The Commonwealth of Australia and State of Victoria* (1904) 1 CLR 329, Connor J, dealing with the question, observed:

It appears to me the only safe rule is to look at the statute itself and to gather from it what is its intention. If we depart from that rule we are apt to run the risk of the danger described by Pollock, CB, in *Miller v Salomons*. 'If', he says, 'the meaning of the language be plain and clear, we have nothing to do but to obey it — to administer it as we find it; and, I think, to take a different course is to abandon the office of judge, and to assume the province of legislation'. Some passages were cited by Mr Glynn from Black on the *Interpretation of Laws*, which seems to imply that there might be a difference in the rules of interpretation to be applied to the Constitution and those to be applied to any other Act of Parliament, but there is no foundation for any such distinction. The intention of the enactment is to be gathered from its words. If the words are plain, effect must be given to them; if they are doubtful, the intention of Legislature is to be gathered from the other provisions of the statute aided by a consideration of surrounding circumstances. In all cases in order to discover the intention you may have recourse to contemporaneous circumstances — to the history of the law, and you may gather from the instrument itself the object of the Legislature in passing it. In considering the history of the law, you may look into previous legislation, you must have regard to the historical facts surrounding the bringing of law into existence. In the case of a Federal Constitution the field of inquiry is naturally more extended than in the case of a state statute, but the principles to be applied are the same. You may deduce the intention of the Legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it. If that limitation is to be applied in the interpretation of an ordinary Act of Parliament, it should at least be as stringently applied in the interpretation of an instrument of this kind, which not only is a statutory enactment, but also embodies the compact by which the people of the several colonies of Australia agreed to enter into an indissoluble union.

[60] There is a need to embark on a historical inquiry to peruse what changes have been made to the original text. The original text of art 121 in the 1957 Constitution of the Federation of Malaya provides:

PART IX

THE JUDICIARY

Judicial Power of Federation	121 The judicial power of the Federation shall be vested in a Supreme Court and such inferior courts as may be provided by federal law.
	128 (1) The Supreme Court shall have such original, appellate and revisional jurisdiction as may be provided by federal law.

[61] The Malaysia Act 1963 (Act No 26 of 1963) introduced amendments the relevant parts of which are:

PART IX

THE JUDICIARY

Judicial Power of the Federation	121 (1) Subject to Clause (2) the judicial power of the Federation shall be vested in three High Courts of co-ordinate jurisdiction and status, namely — (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and (b) one in the Borneo States, which shall be known as the High Court in Borneo and shall have its principal registry at such place in the Borneo States as the Yang di-Pertuan Agong may determine; and (c) one in the state of Singapore, which shall be known as the High Court in Singapore; and in such inferior courts as may be provided by federal law. (2) The following jurisdiction shall be vested in a court which shall be known as the Federal Court and shall have its principal registry in Kuala Lumpur, that is to say, — (a) exclusive jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the court and appealable under federal law to a judge of the Court); and (b) such original or consultative jurisdiction as is specified in Articles 128 and 130.

[62] The current text of art 121 is the result of the inception of the Constitution (Amendment) Act 1988 (Act A704) and the Constitution (Amendment) Act 1994 (Act A885) establishing the Court of Appeal. The current art 121 reads as follows:

PART IX

THE JUDICIARY

Judicial power of the Federation

121(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the states of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed),

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

(1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry in Kuala Lumpur, and the Court of Appeal shall have the following jurisdiction, that is to say:

(a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and

(b) such other jurisdiction as may be conferred by or under federal law.

(2) There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say:

(a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;

[63] It is also observed that the words 'Judicial Power of the Federation' also originally appeared in the marginal note of the original text of the 1957 Constitution of the Federation of Malaya. The marginal note has remained as such but in the more recent authoritative of the Federal Constitution text there is a headline instead. In terms of statutory interpretation, the probative value of marginal note may be questioned but the marginal note has not been something added by printers on or and has remained untouched in the text. In *Bushell v Hammond and others* [1904] 2 KB 563 Collins MR observed:

> The side note although it forms no part of the section is if some assistance inasmuch as it shows the drift of the section.

This has been followed in the Malaysian case of *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35 where Abdoolcader SCJ (as he then was) applied the approach adopted by Collin MR.

[64] Since the term 'judicial power' remains in the heading, there is a need to consider the purport of the term and to view art 121 in its totality after the amendments.

[65] The material question here is whether there is really an alteration of substance. In my view there is none. Three points would be furnished:

(a) *Bennion on Statutory Interpretation* by Francis Bennion (5th Ed) at p 747 provides the following explanation, inter alia:

> A sidenote, marginal note or heading to a section is part of the Act. It may be considered in construing the section or any other provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore possibly inaccurate, guide to the content of the section. Due to a change of practice brought about by the Parliamentary Counsel Office at the beginning of 2001, sidenotes to sections have been replaced by headings. This does not effect any change in their status or use in interpretation.
>
> COMMENT ON CODE S 256
>
> Sidenotes, marginal notes or headings to sections are unamendable descriptive components of an Act. Their function is as a short indication of the content of the section. They should not attempt to summarise, because to do this accurately is nearly always impracticable. In early Acts a marginal note was in the nature of a précis of the section, often quite lengthy. Sometimes a section was equipped with more than one sidenote. Modern sidenotes or headings, strictly rationed to one per section, can only be an approximation, and may not cover all the detailed matters falling within the sections to which they are attached.
>
> Furthermore they may fail to get altered when some amendment made in Parliament would call for this.
>
> Thring said that the sidenotes, when read together in the arrangement of sections at the beginning of the Act, 'should have such a consecutive meaning as will give a tolerably accurate idea of the contents of the Act'. This is a helpful aim, and drafters pursue it.
>
> Sometimes a drafter will use a sidenote or heading to name some concept dealt with in the section. This may throw light on the intention.

(b) The second point relates to the purposes of the amendment in Act A704. Part IX of the Federal Constitution establishes courts as the third branch of government. The amendments have not brought about structural or functional changes to the Judiciary. However granted that

the amendments spirited the words 'judicial power' to a marginal note cannot be intended to be inimical to Part IX of the Federal Constitution. Giving the words its normal interpretation, is it possible to state unreservedly that the amendments brought about by Act A704 is derogatory of the Judiciary. In my view Act A704 cannot be said to be repugnant to the Federal Constitution and on the same breadth, it is arguable that a fundamental branch that is the judiciary is still intact. *Ut res magis valeat quam pareat*.

(c) The recognition of a parallel jurisdiction within the Syariah Courts is still in harmony with art 3 and also compatible with art 8(2) of the Federal Constitution. The inception of art 121(1A) does not amount to an abrogation or an alteration to the jurisdiction of civil courts in the administration of justice.

[66] In the case of *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 certain judicial pronouncements are found in the dissenting judgments of the then Supreme Court. The first expressed by Hashim Yeop A Sani SCJ (as he then was) expresses:

> What is meant by judicial power? No conclusive definition on the concept has been formulated. But the most frequently cited judicial definition was that propounded by the first Chief Justice of the High Court in Australia in 1908 in *Huddart Parker Pty Ltd v Moorehead* where the learned Chief Justice said:
>
> > The words 'judicial power' as used in s 71 of the Constitution mean the power which every sovereign must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.
>
> ...
>
> What is judicial power depends on the Constitution of each country. The word 'judicial power' is not defined in our Constitution. But in the context of art 121 of the Constitution it would be correct to say that the term has the same meaning as discussed in *Muskrat v US*. In the opinion of the US Supreme Court delivered by Mr Justice Day the following appears at p 250:
>
> It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and, with the aid of appropriate legislation, upon the inferior courts of the United States. 'Judicial power,' says Mr Justice Miller, in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision'. Miller, Const 314.

[67] Since federalism is a concept applicable in Australia mention may also be made of the observation of Kitto J in *The Queen v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970–71) 123 CLR 361 at p 374:

> ... Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified.

[68] In the same case Windeyer J stated (at p 394):

> ... Lord Guest and Lord Devlin in 1968, in a dissenting judgment in a case in the Privy Council to which I shall refer later, said:
>
> > Judicial power is a concept that is capable of clear delineation. It has to be, since it is the basis of a constitutional requirement and legislation which falls on the wrong side of the line can be completely avoided. It has been considered many times in relation to those constitutions, particularly the Australian, which provide for the separation of powers.
>
> But, although the concept can be delineated and this court has often had to say on which side of the line a matter falls, the question can give rise to deep controversy. This case shews that. The concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis. It inevitably attracts consideration of predominant characteristics and also invites comparison with the historic functions and processes of courts of law.

[69] Before reverting to r 137 the speech of Lord Morris in *Connelly v DPP* [1964] AC 1301 may be cited:

> There can be no doubt that a court which is endeavored with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and suppress any abuses of its processes and to defeat any attempted thwarting of its process.

[70] The Federal Constitution has manifestly and categorically vested the Federal Court with judicial functions. The making of subsidiary legislation is a limited legislative function to supplement the exercise of jurisdiction. It has to be borne in mind that the rules committee comprise not only of judges of the superior courts but also, the representative of the attorney general's office as well as members of the Bar. In the context of the submission of the SG there is no doubt that the integrity of a final judgment, when the appellate processes have been completed, have to be protected for its finality or conclusiveness for that is fundamental to the facet of appellate jurisdiction vested in the Federal Court. In *Public Prosecutor v Masran Abu & Ors* [1971] 4 MC 192 Raja Azlan Shah J (as he then was) observed with insight '... the law must aspire at certainty, at justice, at progressiveness. That is so only if the courts from time to time boldly lay down new principles to meet new social problems'.

[71] Rule 137 is contained in the Rules of the Federal Court 1995 PU (A) 376 of 1995 but it was brought into force retrospectively on 24 June 1994. The Rules of the Federal Court 1995 superseded the Rules of the Federal Court 1980 that did not contain any rule identical to r 137. It is to be noted that with PU(A) 376 having been deemed to come into force on 24 June 1994, the date is contemporaneous with the coming into force of Act A885 mentioned above (in para 50) that is the legislation that effected an amendment to art 121 of the Federal Constitution which brought about, inter alia, the establishment of the Court of Appeal and consequently resulting in the Federal Court as a final appellate court.

[72] The rule itself is been framed as a deeming provision. The words '... nothing shall be deemed to limit or affect' means also nothing in the rules shall be regarded as limiting or affecting the inherent powers of the court. The 'Court' of course is a reference to the Federal Court. The SG seems troubled by the source of the power. Is the deeming provision a legal fiction or statutory hypothesis. The term 'inherent powers' refers to the judicial powers of the Federal Court itself. 'Inherent' means it is intrinsic or organic to the judicial powers of the Federal Court and hence being so the Federal Court draws upon it in the limited circumstances prescribed in r 137 namely to address injustice or abuse of processes. A certain reserve of powers intrinsically remains with the court for the simple reason that the Federal Court is created by the constitution as a judicial organ at the apex of the judiciary. Hence by virtue of being at the apex it is only the Federal Court (and no other non judicial branch) that has to be the organ to deal with 'injustice' or 'abuse of processes'. It is in that limited sense that the jurisdiction itself stems from the inherent powers, for the powers being intrinsic and organic to the judicial powers of the Federal Court, those powers may therefore be drawn upon as and when circumstances require. It

therefore constitutes a separate exercise and more of a rectifying process. The exercise of that inherent power will only be triggered by an application made to it, upon which the court could said to become seized of it. In that sense it could be said to exercise an inherent jurisdiction.

[73] From the survey of judicial precedents cited above it is discerned that this court has postulated numerous but not necessarily exhaustive circumstances before the inherent power is drawn upon to introspect upon any final order of this court after an appeal has been disposed of by this court. Caution and prudence appear to be the beacon when an application is lodged pursuant to r 137. I state so because there may be sensed a clear and present danger that litigants may camouflage the real intent and object of invoking r 137. This is said to anticipate r 137 being a chameleon to r 107 (which relates to an application for leave to the Federal Court to appeal). Rule 137 may be treated as though leave is applied again to review a final order made by the Federal Court. No question of 'threshold jurisdiction' is therefore applicable in the context of r 137 as it being evolved. In addition the processes to be invoked under r 137 should not bear any semblance to 'judicial review' in the strict sense of O 53 of the Rules of the High Court 1980 in the context of which other 'jurisdictional issues' may be raised in the process of the review of administrative legislation or even executive decision.

[74] The development of r 137 remains to be seen. The concept of injustice or abuse of processes are jurisprudential concepts that have also devolved from the common law. This relates to art 160(2) of the Federal Constitution where the word 'law is defined to include written law, the common law in so far as it is in operation in the Federation or any part thereof'. It would beyond the scope of this judgment to explore the detailed definition and scope of the common law and its applicability of r 137. In a public lecture before the Institution of Engineers Malaysia Kuala Lumpur 31 March 1989 now incorporated in the publication *Constitutional Monarchy, Rule of Law and good Governance*, HRH Sultan Azlan Shah explained:

> This is how the common law of every country works. Until statutory laws are introduced, in certain areas of the law, a corpus of unwritten laws continue to co-exist. The broad principles of law on a particular aspect of the law, once applied by the Malaysian courts, become part of the common law of Malaysia.
>
> These broad principles are then, by judicial development of the law through adaptation and application, extended to situations to which they had not previously been applied. The process involves the gradual distilling of principles from the facts of concrete cases.
>
> In a strict sense, it is not new law but merely the application of established principles adapting to the changing circumstances in any country.
>
> Thus is the genius and the strength of the common law — it can adapt to changes to suit the needs without having the constraints which are attached to written laws.

If common law of England is being evolved, there is also expected a consequential development to the Malaysian common law. The reference to *Taylor*'s case and *Pinochet*'s case are lucid illustrations. In *Raja Mokhtar bin Raja Yaakob v Public Trustee, Malaysia* [1970] 2 MLJ 151, Raja Azlan Shah J (as he then was) observed:

> Although decisions of commonwealth courts are not binding they are entitled to the highest respect.

[75] In the matter of the application before us, there is not here a question of jurisdiction as though it is a new jurisdiction as contended. The court cannot confer on itself jurisdiction. We are hearing an application where the applicant is applying to this court to draw upon its inherent powers. However having appraised the judgment of this court dated 29 January 2010, it is found that the applicant has not been able to persuade this court that his complaint falls within the scope of r 137. The court in arriving of its decision on 29 January 2010 has already evaluated issues of facts and law and arrived at an interpretation. To accede to the issues raised by the applicant is tantamount to permitting a case to be re-litigated primarily on account of the applicant disagreeing with certain interpretation of law. The object of r 137 is not to defeat finality.

[76] Thus we have stated that even assuming that we are hearing this application on the basis that there is such an additional jurisdiction which as stated above is not the case, the application equally fails to meet the requirements of r 137. Consequentially, the application has been dismissed.

Application dismissed.

Reported by Kanesh Sundrum